United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket No. 74-1633

IN RE

PENN CENTRAL COMMERCIAL PAPER
LITIGATION

ALEX SHULMAN,

Plaintiff-Appellee,

-against-

GOLDMAN, SACHS & CO., et al.,

Defendants-Appellees,

SEATTLE-FIRST NATIONAL BANK,

Applicant-Appellant.

BRIEF OF PLAINTIFF-APPELLEE ALEX SHULMAN

STATEMENT OF ISSUES

1. Was the District Court correct in denying appellant's motion to intervene as of right pursuant to Fed.R.Civ.P. 24(a)(2)?

2. Did the District Court abuse its discretion in denying appellant's motion for permissive intervention pursuant to Fed.R.Civ.P. 24(b)(2)?

3. With respect to the order of the District Court denying appellant's motion for consolidation pursuant to Fed.R.Civ.P. 42(a)

(a) May an appeal be taken from such order?

(b) Is an appeal from the order properly before this Court?

(c) Did the District Court abuse its discretion in denying consolidation?

STATEMENT OF THE CASE

This is an appeal by Seattle-First National Bank ("Seafirst") from an order of Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York, dated April 4, 1974, denying Seafirst's motion for intervention as a plaintiff as of right or with the court's permission pursuant to Fed.R.Civ.P. 24(a)(2) and 24(b)(2) in Alex Shulman v. Goldman, Sachs & Co., 71 Civ. 1996 (DNE) ("Shulman I"). In its brief on this appeal, Seafirst states that this appeal is also from that part of Judge Edelstein's order denying Seafirst's motion to consolidate Shulman I with Alex Shulman v. Seattle-First National Bank (W.D.Wash. Civ. No. 9760), 72 Civ. 616 (DNE) ("Shulman II") pursuant to Fed.R.Civ.P. 42(a). However, it should be noted that the appeal from the denial of the consolidation motion was not mentioned as an issue to be raised on appeal in either Seafirst's pre-argument statement, filed

with this Court on or about May 10, 1974, or in its letter dated June 6, 1974 written pursuant to Fed.R.App.P. 30(b).

Both Shulman I and Shulman II arise out of the purchase by Shulman, on January 5, 1970, of a $300,000 face amount commercial paper note issued by Penn Central Transportation Company ("Penn Central"). The note was purchased for Shulman by Seafirst from Goldman, Sachs & Co. ("Goldman, Sachs")(A.44a-45a).* On June 21, 1970, prior to the maturity date of the note, Penn Central filed for reorganization and the note has not been paid (A.49a-50a).

Shulman I was commenced by Shulman on or about May 5, 1971 against Goldman, Sachs in the Southern District of New York to recover the $300,000 face amount of the Penn Central note (A.41a-53a). Shulman II was commenced by Shulman against Seafirst on or about June 16, 1971 in the Western District of Washington to recover the same $300,000 (A.53a-69a). Seafirst thereafter impleaded Goldman, Sachs in Shulman II (A.70a-78a).

Shulman claims in Shulman I that Goldman, Sachs, in connection with the sale of the Penn Central note, failed to disclose certain material facts and misrepresented other facts regarding the financial condition of Penn Central in

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* References to Appellant's Appendix are herein designated by "A" followed by the page references in the Appendix.

violation of federal and state securities laws and other laws. A similar claim has been made against Seafirst in Shulman II. The complaint also alleges that such violations were committed by Seafirst in concert with Goldman, Sachs. In Shulman II, Seafirst as third-party plaintiff charges Goldman, Sachs with making the identical misrepresentations and omissions. Goldman, Sachs, in its answers to the complaint in Shulman I and the third-party complaint in Shulman II, denies the material allegations in each complaint and alleges, as a defense, that Shulman and Seafirst, respectively, had full knowledge of all material facts (A.56a, 81a).

Shulman I and Shulman II were both included among the Penn Central Commercial Paper Litigation cases consolidated for purposes of coordinated pre-trial discovery by the Judicial Panel on Multidistrict Litigation and assigned to Chief Judge Edelstein of the Soutern District of New York for such purposes. On December 13, 1973, the Judicial Panel issued a conditional remand order to remand Shulman II to the Western District of Washington. Seafirst filed a notice of opposition to the conditional remand order and thereafter brought its motion to consolidate or intervene. Chief Judge Edelstein denied Seafirst's motion in an opinion and order dated April 4, 1974, reported as Shulman v. Goldman, Sachs & Co., 62 F.R.D. 341 (S.D.N.Y. 1974). The initiation of the motion and this appeal have had the effect of staying the conditional remand order.

POINT I

THE DISTRICT COURT'S ORDER DENYING SEAFIRST'S MOTION TO INTERVENE SHOULD BE AFFIRMED

A. The District Court Was Correct in Holding That Seafirst Could Not Intervene as of Right in Shulman I

Fed.R.Civ.P. 24(a)(2) provides for intervention as of right, upon timely application,

> . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, to have the right to intervene, an applicant must meet three requirements: (i) he must have an appropriate "interest", (ii) he must be properly "situated", and (iii) his interest must be inadequately represented.

Seafirst argues that, in deciding the "interest" requirement, the District Court erred "in holding that intervention was precluded because Seafirst could not maintain an independent action against Goldman, Sachs." (Appellant's Brief p. 8) But that argument misconstrues the District Court's holding, which was that an intervenor must be entitled to the relief it requests. This is the very

crux of the "interest" requirement of Rule 24(a)(2) and in this action Seafirst is not so entitled.

As the District Court noted, Seafirst does not "clearly identify the interest it asserts as the basis for its proposed intervention" (A.94a). 62 F.R.D. at 346. The claimed interest cannot be an interest in the Penn Central note, because at this time that interest belongs only to Mr. Shulman and Seafirst does not have standing assert it.

The "interest" requirement is often stated in terms of plaintiff's "standing to sue". "Intervention as of right presupposes that the applicant has a right to maintain a claim for the relief sought . . . ." Solien v. Misc. Drivers and Helpers Union, Local 610, 440 F.2d 124, 132 (8th Cir. 1971), cert. denied sub nom., Sears Roebuck & Co. v. Solien, 403 U.S. 905 (1971); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481, 483 (S.D.N.Y. 1973). See United States v. 936.71 Acres of Land, 418 F.2d 551, 556 (5th Cir. 1969).

In this action, the application of the "standing" principle to Seafirst's proposed intervention complaint clearly demonstrates why Seafirst does not have the right to intervene. In its proposed intervention complaint, Seafirst demands judgment

> (a) rescinding the sale by defendant to the plaintiff of the said commercial paper of Penn Central and directing that defendant pay to the plaintiff the amount paid by the plaintiff to defendant for said commercial paper, with interest thereon; or in the alternative;
>
> (b) awarding the plaintiff damages in the sum of $300,000, with interest thereon . . . (A.39a)

Seafirst obviously is not entitled to this relief until Shulman, who has suffered the $300,000 loss, recovers judgment against it. Seafirst's allegation that it "hereby tenders to Goldman, Sachs the Penn Central promissory note . . . and demands recission [sic] of the sale" (¶ 21 of its proposed intervention complaint, A.33a) highlights the inappropriateness of its request. The note is presently in Shulman's possession and unless Seafirst is now willing to accept Shulman's tender of rescission, tender to Goldman, Sachs can only be made by Shulman. Consequently, whatever "interest" Seafirst may now have in Shulman's Penn Central note is at best contingent and is not sufficient to mandate intervention.

Seafirst asserts in its prayer for relief (and nowhere else) that it seeks its relief on behalf of Shulman. But Shulman is doing this on his own behalf in Shulman I and no claim is made that he is inadequately represented there. In any event, Seafirst cannot assert Shulman's interest as its own.

Seafirst's claim of interest appears to boil down to the argument that it is entitled to enter Shulman I to protect itself against the possibility of being found liable in Shulman II. We submit that this is a bootstrap reading of Rule 24(a)(2) and that such an "interest" is not "an interest relating to the property or transaction which is the subject of the action" entitling Seafirst to intervene in Shulman I. The logical inconsistency of Seafirst's argument did not escape recognition by the District Court, which stated:

> It cannot be said with any certainty that the outcome of Shulman I will impair Seattle-First's ability to protect itself in Shulman II. And because it is that impairment itself which forms the basis for the interest Seattle-First asserts to justify intervention, it cannot be said that Seattle-First has a direct and significant interest in Shulman I. The motion for intervention as of right must be denied for failure to comply with the interest requirement of Rule 24(a)(2). (A.98a), 62 F.R.D. at 347.

Even if Seafirst can show that it has an "interest" in Shulman I, it cannot establish that its "interest" will be impaired if it is not present in the prosecution of that action. Seafirst cites three cases to support its claim that its interest will be impaired because principles of stare decisis raise a practical impediment to the protection of that interest. These cases are inapposite to the situation before this Court.

The common thread running through each of these three cases is that the issue of law to be decided in the principal action is determinative of the intervenor's interest and would be identical to that required to be decided in a separate action brought by the intervenor had intervention been denied. In Nuesse v. Camp, 385 F.2d 694 (D.C.Cir. 1969), that legal issue was whether the Comptroller of the Currency could approve branch banking by a national bank in Wisconsin contrary to a Wisconsin statute which the intervening Wisconsin Commissioner of Banks sought to uphold; in Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967), the determinative issue was whether the United States had jurisdiction over offshore reefs which the intervenor had sought to develop for itself and claimed were beyond such jurisdiction; and in Martin v. Travelers Indemnity Co., 450 F.2d 542 (5th Cir. 1971), a driver against whom a judgment had been granted in a prior action was allowed to intervene where the issue raised by the injured plaintiff in an action against the insurer was whether the policy covered the accident.

In each of the three cases the issues as to which stare decisis could have been applied involved a legal determination of rights to the interest that the intervenor sought to protect. It is understandable that in those cases the intervenor should have been allowed to present his position in the first instance. In the present situation, however, no legal issue determinitive of Seafirst's interest exists in Shulman I. In

Shulman I, the issue is whether Goldman, Sachs is liable to Shulman. In Shulman II, the issues will be whether Seafirst is liable to Shulman, and if so, whether Goldman, Sachs is then liable over to it. Whichever way Shulman I goes, neither of these two issues can be determined by its result.

B. The District Court Did Not Abuse Its Discretion in Denying Seafirst Permission to Intervene in Shulman I

Fed.R.Civ.P. 24(b)(2) allows intervention with the permission of the court, upon timely application,

> . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The reasons stated by the District Court for denying permissive intervention were appropriate and sufficient and involve no abuse of discretion (A.99a-100a), 62 F.R.D. at 348. Allowing intervention would inject into the proceeding the issue of Seafirst's rights against Goldman, Sachs, an issue clearly collateral to those raised between the primary litigants. The injection of such an issue clearly would make a complicated trial even more complex, to the clear prejudice of the existing parties. The grant of intervention now will only delay and protract the trial of these issues, already long overdue. See United States v. Columbia Gas & Elec. Corp., 27 F.Supp. 116, 120 (D.Del. 1939).

Allowing Seafirst to intervene as a plaintiff in Shulman I would be particularly pointless because if Goldman, Sachs is successful, the issue of Seafirst's liability to Shulman would still have to be resolved in Shulman II. No possible judicial economy could result from intervention that would to any degree offset the confusion and delay that will inevitably result. Indeed, the very existence of Shulman II as a forum allowing Seafirst to litigate its rights is sufficient reason in and of itself to preclude intervention. Johnson v. Rockefeller, 58 F.R.D. 42, 45 (S.D.N.Y. 1972).

POINT II

THE APPEAL FROM THE ORDER DENYING CONSOLIDATION SHOULD BE DISMISSED. IF NOT, THE ORDER SHOULD BE AFFIRMED

In this Circuit, it has long been the rule that, absent exceptional circumstances, an order denying consolidation is an interlocutory order for which this Court lacks jurisdiction to entertain an appeal. Levine v. American Export Industries, Inc., 473 F.2d 1008, 1009 (2d Cir. 1973); MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958). No exceptional circumstances have been claimed or shown to exist by Seafirst. Indeed, apparently Seafirst had such doubts about the appealability of the order that it did not include this issue in its statement of the

issues to be raised on appeal either in its pre-argument statement, filed with this Court on or about May 10, 1974, or in its letter of designation, dated June 6, 1974, as required by the second sentence of Rule 30(b) of the Federal Rules of Appellate Procedure. Therefore, the appeal from the order denying consolidation of Shulman II with Shulman I should be dismissed.

Even assuming that the District Court's order is appealable and the right to appeal was preserved by Seafirst, the denial of Seafirst's motion to consolidate was not an abuse of discretion by the District Court requiring reversal. On the contrary, denial of the motion is the only result that may properly be reached under the appropriate statutes and rules.

It is well established that a court cannot consolidate an action pending in another district with one pending before it unless the foreign district action is first transferred to the court considering the consolidation. 5 Moore's Federal Practice ¶ 42.02 n.14 and cases cited therein. Seafirst argues that the transfer of Shulman II to this District under 28 U.S.C. § 1407 for "coordinated or consolidated pretrial proceedings" has already accomplished the transfer needed as a condition to consolidation. This is not so.

What may happen to a case transferred under 28 U.S.C. § 1407 is governed by Rule 15(b) of the Rules of

Procedure of the Judicial Panel on Multidistrict Litigation, 28 U.S.C. following § 1407. Rule 15(b) reads, in pertinent part, as follows:

> Each transferred action that has not been terminated in the transferee court will be remanded to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406 . . . .

28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought" (emphasis supplied).*

Seafirst is a national bank and as such can be sued only in the district where it is "established" or "located". 12 U.S.C. § 94; Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir. 1968), cert. denied, 393 U.S. 855 (1968); Rome v. Eltra Corp., 297 F.Supp. 314, 315 (E.D.Pa. 1969). As Seafirst is not established in this district, Shulman could not have brought his action against it here and the transfer required to consolidate Shulman II with Shulman I cannot be effected.

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* 28 U.S.C. § 1406 concerns actions in which venue is laid in a wrong division or wrong district, and, consequently, is not relevant to the questions before the Court.

Accordingly, the order of the District Court denying Seafirst's motion to consolidate Shulman II with Shulman I should be affirmed if the appeal from such order is not dismissed.

CONCLUSION

The order of the District Court denying Seafirst's motion to intervene as a plaintiff in Shulman I should be affirmed. The appeal from the order of the District Court denying Seafirst's motion to consolidate Shulman II with Shulman I should be dismissed or, in the alternative, that order should be affirmed.

Respectfully submitted,

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January 27, 1975

UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket No. 74-1633

IN RE PENN CENTRAL COMMERCIAL PAPER LITIGATION

ALEX SHULMAN,

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-against-

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Defendants-Appellees,

SEATTLE-FIRST NATIONAL BANK,

Applicant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JEAN SILVER, being duly sworn, deposes and says:

I am not a party to this action and am over the age of 18 years;

On January 27, 1975, I served two copies of the annexed brief of Plaintiff-Appellee Alex Shulman upon the following attorneys:

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at the above addresses designated by said attorneys for that purpose, by depositing two true copies thereof enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department at 345 Park AVenue, New York, New York 10022.

Joan Silver

Sworn to before me
January 27, 1975

Noah Scooler

NOAH SCOOLER
Notary Public, State of New York
No. 31-4513251
Qualified in New York County
Commission Expires March 30, 1978

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